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No. 866

IN THE

Supreme Court of the United States

October Term, 1958

JOSEPH M. BRENNAN, Petitioner,

versus

W. A. WILLS, LTD.; W. A. WILLS, HERMAN SPEKEN; WILLIAM GREENBERG, HERBERT KORHOLZ; SPEKEN WRECKING CO.; ROCK WOOL INSULATING COMPANY, a Colorado corporation, and M.P.M. INVESTMENT COMPANY, a Delaware corporation, Respondents.

BRIEF OF RESPONDENTS W. A. WILLS, LTD., W. A. WILLS, HERMAN SPEKEN, WILLIAM GREENBERG, HERBERT F. KORHOLZ AND SPEKEN WRECKING CO. IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF OF RESPONDENTS W. A. WILLS, LTD., W. A. WILLS, HERMAN SPEKEN, WILLIAM GREENBERG, HERBERT F. KORHOLZ AND SPEKEN WRECKING CO. IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case is erroneous and misleading in several respects and for this reason we make a short statement of the material facts.

The third amended complaint of Joseph M. Brennan, Petitioner, filed in the United States District Court for the District of Colorado, alleged that one Melia purchased 50 shares of the capital stock of Rock Wool Insulating Company, a Colorado corporation, and received stock certificate No. 46 representing such stock (R. 12). The com-

plaint also alleged that on or about September 11, 1952, Melia and his wife, May B. Melia, entered into an agreement with W. A. Wills, Ltd., at Pueblo, Colorado, wherein said certificate of stock No. 46 was pledged by said Melias as security for a loan of $1,200.00. (R. 14). The complaint also alleged that on August 13, 1954, Melia and his wife, sold, assigned, and transferred all right, title and interest in stock certificate No. 46 to the Petitioner by a written instrument but did not deliver stock certificate No. 46 (R. 14).

The District Court entered a judgment and order to dismiss the third amended complaint in replevin October 30, 1957 on the ground that the Plaintiff had no title to the certificate of stock which he sought to replevin in that the said third amended complaint failed to show a compliance with the statutes of the State of Colorado necessary to transfer title to a certificate of stock and to the shares represented thereby from the record owner of said stock certificate to the plaintiff (R. 30).

The statement made by the Petitioner on page 6 of his petition that "the court on its own motion granted Petitioner leave to file a third amended complaint to include additional party defendants . . ." is inaccurate. The order (R. 10) does not refer to additional parties and no order to issue summonses to additional parties was ever granted.

On appeal the Court of Appeals affirmed the judgment of the District Court and in its opinion stated the following with reference to the statutes replied upon by the District Court (appendix, Petition for Writ of Certiorari, pp. 20, 21):

> "it is provided by statute in Colorado, C.R.S. 1953, 31-9-1, that title to a certificate and to the shares of

stock represented thereby can be transferred only by delivery of the certificate endorsed either in blank or to a specified person by the person appearing in the certificate to be the owner of such stock, or by delivery of the certificate and a separate written assignment of the certificate or of a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. And it is further provided by statute in that state, C. R. S. 1953, 31-9-10, that an attempted transfer of title to a certificate of stock or to the shares represented thereby without delivery of such certificate shall have the effect of a promise to transfer; and that the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts. When these statutes are considered together, it is clear that in Colorado legal title to shares of stock issued by a corporation organized under the law of that state can be effectively transferred in only one or the other of two methods. One method is by delivery of the certificate with an endorsement thereon in blank or to a specified person, signed by the person appearing in the certificate to be the owner thereof. The other is by delivery of the certificate and a separate document containing a written assignment or a power of attorney to sell, assign, or transfer the same, signed by the person appearing in the certificate to be the owner of the stock. These methods are exclusive, and any attempt to transfer stock without delivery of the certificate does not have the effect of passing title but merely constitute a promise to transfer.

The statutes discussed above were passed by the Colo-

rado Legislature in 1927 and are set forth in the appendix to this Brief of Respondents in Opposition to Petition for Certiorari.

THE PETITION FAILS TO STATE ANY GROUND FOR CERTIORARI

The Petition for Certiorari does not set forth any of the grounds in Rule 19 of part V of the Revised Rules of this Court effective July 1, 1954, in that:

(a) The decision of the Court of Appeals is not in conflict with the decision of any other court of appeals on the same matter;

(b) The Court of Appeals did not decide an important state question in a way in conflict with applicable law;

(c) The Court of Appeals did not decide an important question of Federal law which has not been settled by this Court;

(d) The Court of Appeals did not decide a Federal question in conflict with applicable decisions of this Court;

(e) The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings or sanctioned such departure by a lower court as to call for an exercise of this Court's power of supervision.

The Petition for Certiorari does not set forth the basis for Federal jurisdiction in the court of first instance as required by Rule 23 (1) (g) of part V of the Revised Rules of this Court effective July 1, 1954.

The Petition for Certiorari does not comply with Rule 23 (3) of part V of the Revised Rules of this Court ef-

fective July 1, 1954, in that the petition contains many references to the Petitioner's brief to the Court of Appeals which constitutes a separate brief annexed or appended to the petition in violation of said Rule.

ANSWER TO PETITIONER'S ALLEGED REASONS FOR GRANTING THE WRIT

As shown by the quotation from the opinion of the Court of Appeals, that Court based its decision upon §31-9-1 and §31-9-10, Colorado Revised Statutes 1953, which are set forth in the appendix to this Brief in Opposition to Petition for Certiorari. These statutes enacted the Uniform Stock Transfer Act.

Speaking of the Uniform Stock Transfer Act, the Ohio Court in a syllabus written by it said, at page 887 of *Knight v. Shutz*, 141 Ohio St. 267, 47 N.E. 2d 886 (1943):

> "2. The Uniform Stock Transfer Act is all inclusive and admits of no exception.
>
> • • • •
>
> "4. The title to a stock certificate and the shares represented thereby can be transferred only by delivery of the certificate properly endorsed or accompanied by a second separate document containing a written assignment or a power of attorney to assign or transfer the certificate or the shares represented thereby. . ."

Since under the Uniform Stock Transfer Act Petitioner does not have title to certificate No. 46, or to the shares represented thereby, he cannot maintain a replevin action. As is said in 46 Am. Jur. Replevin §23:

> "Replevin can be maintained only by one who has the general or special property in the thing taken or de-

tained, at the time of the commencement of the action. Such right of possession or ownership must be one by a title recognized at law, as distinguished from one recognized only in courts of equity."

The six Reasons for Granting the Writ stated on page 7 of the Petition are not supported by the authorities in that division of the petition. Such statements as reason "(3)" that "it dismiss the action in replevin on the pleadings which were admitted to be true and sufficient in statutory scope and detailed as prescribed by the legislature for petitioner's guidance and protection; * * *" are unfounded. The Petitioner seems to be arguing that a motion to dismiss for failure to state a claim upon which relief can be granted admits not only the facts which are pleaded, but also that these facts state a claim upon which relief can be granted. We will not discuss these six reasons separately but will confine ourselves to pointing out that the authorities cited in the Petition for Writ of Certiorari do not support the alleged reasons for granting the Writ.

I.

The following is an analysis of the cases and material contained in the Petition for Writ of Certiorari beginning at page 8. We feel certain that such analysis will show the inapplicability of such material to the situation at bar.

However, before doing so, may we call this Court's attention to certain of its pronouncements pertaining to the necessity of differentiating cases on their facts. In *German Alliance Insurance Company v. Home Water Supply Co.*, 226 U.S. 220, 234, 33 S. Ct. 32, 36, (1912) this is said:

"But the facts there differ from those in this record. * * * It was that question alone, as to the character of the suit and judgment, which was before this Court.

What was said in the opinion must be limited, under well known rules, to the facts and issues involved in the particular record under investigation. * * *"

Again, in *Parsons v. District Court of Columbia*, 170 U.S. 45, 51, 18 S. Ct. 521, 523 (1898):

"It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case * * *."

And in *Ogden v. Saunders*, 12 Wheat. 213, 233, 6 L. Ed. 606:

"It is a general rule, expressly recognized by the court in Strugis vs. Crowninshield, that the positive authority of a decision is coextensive only with the facts on which it is made."

The Petitioner states on page 8 of his Petition for Certiorari that his action is "closely similar" to the issue in the case of *U. S. v. Butt*, 203 F. 2d 643 (10th Cir. 1953). In that case the United States as the assignee of a note and mortgage on wheat sued the defendant for conversion of the wheat. The Court of Appeals held that a chose in action for conversion is assignable. The action was not a replevin action nor did it involve corporate stock.

The remaining cases cited by the Petitioner in paragraph 1(a) of page 8 of the Petition for Writ of Certiorari are not in point. *Tome v. Dubois*, 6 Wall. 548, 73 U.S. 548, 18 L. Ed. 943 (1866), was an action in trover for the conversion of logs. *Cook v. Ball*, 144 F. 2d 423 (7th Cir. 1944), was an action by the Superintendent of Banks of the State of Ohio as trustee for creditors of a partnership to recover the value of shares of stock claimed to have

been converted by the defendants. *Black v. Zacharie*, 3 Howard 483, 11 L. Ed. 690 (1845), involved the right of a creditor of the owner of stock to attach after the creditor had notice of an assignment of the stock for the benefits of creditors under the law of Louisiana as it existed prior to 1845. *Hatch v. Std. Oil Co.*, 100 U.S. 124, 25 L. Ed. 554 (1879), was an action of replevin by the purchaser of barrel staves against a sheriff who had attached them. The question was whether or not a delivery had been made to the purchaser such as to pass title so that creditors of the seller could not attach. *Leonard v. Davis*, 1 Black 476, 66 U.S. 222 (1861), was an action in assumpsit on a written agreement concerning the sale of logs. *Slaughter v. Glenn*, 98 U.S. 242, 25 L. Ed. 122 (1878), was an action to recover real property. The question was whether or not the wife alone could convey her real estate. *Talty v. Freedman's Trust Co.*, 93 U.S. 321, 23 L. E. 886 (1876), concerned whether or not a pledgee had authority to dispose of the pledged property. *Helvering v. Kaufmann*, 136 F. 2d 356 (4th Cir. 1943), decided that for tax purposes, as between the corporation and a stockholder, it was not necessary to deliver a certificate representing stock to a shareholder to constitute him its owner for purposes of determining the year in which a dividend in stock was made.

Paragraph 1(b) on pages 8 and 9 of the Petition for Writ of Certiorari states that when the terms of a sale are agreed upon, and the bargain struck, and everything that the seller has to do with the property is complete, the contract of sale becomes absolute between the parties without delivery. None of the cases cited for the proposition deal with the sale of stock under the stock transfer act. *Tome v. Dubois*, *supra*, was an action in trover for the conversion of logs. *Anderson v. Courtney*, 203 Okla.

71, 218 P. 2d 361 (1950), concerned the sale of a water tank. *U. S. v. San Francisco Electric Contractors Ass'n.*, 57 F. Supp. 57 (N.D. Calif. S.D. 1944), was a proceeding by the United States charging that the defendants combined to fix prices in violation of the Sherman Anti-Trust Act. *Bowles v. Jung*, 57 F. Supp. 701 S.D. (Calif. C.D. 1944), was an action to recover triple damages for price fixing on tangerines. *Pacific Co-op v. U. S.*, 91 F. Supp. 372 (Ct. Cl. 1952), was an action against the United States to recover part of the purchase price of eggs which involved a determination of the applicable OPA price. *American Surety Co. of New York v. Baker*, 172 F. 2d 689 (4th Cir. 1949), involved whether or not a claim for the conversion of hogs could be assigned. *Slaughter v. Glenn, supra*, was an action to recover real property. *Crump v. Hill*, 105 F. 2d 124 (5th Cir. 1939), was an action to recover book accounts by a trustee in bankruptcy which had allegedly been assigned without compliance with certain statutes of Mississippi. *In re Spain's Estate*, 46 NYS 2d 789 (1944), was an action to settle the accounts of an administrator, and concerned among other things, whether as between the parties a gift of stock had been made prior to the death of the deceased. *Livingston v. Powell*, 257 Ala. 38, 57 S. 2d 521 (1952), concerned whether or not a decedent had made a gift of stock certificates, government bonds and money, all of which were found in his safety deposit box after his death. The court held that the Uniform Stock Transfer Act had not been complied with and affirmed the lower court's denial of the Plaintiff's claim. *In re Millard's Estate*, 77 Pa. D. & C. 97 (1911) held that where the owner of shares, intending to make a gift thereof, executed an assignment and power of attorney to transfer shares of stock but was unable to deliver the certificate prior to his death because of his last illness, there was a valid gift between the parties. *Winslow v. Fletcher*, 53

Conn. 390, 4 A. 250 (1886), held that where stock is pledged for a debt the obligation to reconvey it is not a debt subject to garnishment but can only be reached by attaching the stock subject to the pledge. *Miller v. Hospelhorn*, 176 Md. 356, 4 A. 2d 728 (1939), indicates that constructive delivery of negotiable notes can be made to a wife by endorsing the notes in blank and leaving them in the possession of her husband for her. *Lyons v. Freshman*, 124 Mont. 485, 226 P. 2d 775 (1950), was similar to the present case but does not sustain the position of the petitioner. In that case the holder of a separate written assignment for shares of stock was unsuccessful in his attempt to obtain the stock. The court cited provisions of the Uniform Stock Transfer Act, the controlling provisions of the Montana statutes being identical with the Colorado statutes, and held that inasmuch as plaintiff's only claim was by virtue of a separate written assignment he did not have title to the stock for the reason that the Act was not complied with and that the stock certificate had not been delivered to him. *Richardson v. Commissioner of Internal Revenue*, 126 F. 2d 562 (2d Cir. 1942), held that where taxpayers instructed their agents to hold stock for the taxpayers' wives, but did not instruct the agents to transfer the stock to the wives until after passage of the gift tax, there was no completed gift until after the Act was passed. *U. S. v. Rosebush*, 45 F. Supp. 664 (E. D. Wis. 1942), involved the question whether or not under Wisconsin law a wife became a purchaser entitled to protection against a U.S. tax lien against her husband. The husband transferred stock by endorsing the certificate in blank. The certificate was found in her stock portfolio in their joint safety deposit box. Each of the parties kept a record of their stock holdings and entries were made in their individual journals relating the transfer. The subject of *Helvering v. Kaufman, supra*, is stated above.

The statements on page 10 of the Petition for Writ of Certiorari regarding the provisions of Colorado Rules of Civil Procedure 104, Replevin, are inaccurate and misleading. The operative provisions of that rule are as follows:

"(a) Personal Property. The plaintiff in an action to recover possession of personal property may, at any time before judgment, claim the delivery of such property to him as provided in this rule. (Code Sec. 85.)

"(b) Causes; Affidavit. Where a delivery is claimed, an affidavit shall be filed, showing:

(1) That the plaintiff is the owner of the property claimed, particularly describing it; or is lawfully entitled to the possession thereof;

(2) That the property is wrongfully detained by the defendant;

(3) That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff; or if seized, that it is by the statute exempt from such seizure; and,

(4) The value of the property. (Code Sec. 86.)"

The remainder of the rule relates to procedural matterms and is fully set forth in the appendix to this Brief.

II.

In paragraph 2(a) on page 10 of the Petition for Writ of Certiorari the Petitioner cites the case of *Reeves v. Stokel*, 120 Colo. 82, 208 P. 2d 94 (1949). That case was an action of replevin to recover a house trailer. The Plaintiff sold the trailer to a purchaser under a conditional

sales contract which provided the purchaser could not transfer the trailer. The purchaser nevertheless transferred the trailer giving a bill of sale which recited that it was subject to a first mortgage. Although the plaintiff assigned the contract to a bank, he kept title and was obligated to pay the bank if the purchaser did not. It was held that the plaintiff had sufficient title to bring a replevin action to recover the trailer when the bank was not paid. *Gross v. Dreiling*, 127 Colo. 420, 257 P. 2d 402 (1953), was a replevin action to recover an automobile in which a seller took a note and chattel mortgage from a buyer and assigned them to a bank with recourse. It was held that the seller could maintain replevin upon the nonpayment of the buyer.

McCleod v. Fourth Nat'l Bank of St. Louis, 122 U.S. 528, 30 L. Ed. 1237 (1887), was an action against a bank which had loaned money secured by cotton. The owner of the cotton fraudulently obtained a bill of lading overstating the amount of cotton and drew a draft on the Plaintiffs who purchased the cotton. The accepted draft was sold to a bona fide purchaser and the plaintiffs were compelled to pay it. It was held that the defendant bank did not participate in and was not responsible for the fraud. The case does not contain the quotation found on page 11 of the Petition for Writ of Certiorari, nor does it mention corporate stock.

The subject of *Talty v. Freedman's Savings and Trust Co., supra*, is indicated above. *In re Rogers*, 20 F. Supp. 120 (N.D. W.Va. 1937), involved a proceeding in bankruptcy. The bankrupt was the fiduciary of the estates of decedents and also a beneficiary of these estates. He was indebted to the estates and pledged certain stocks, securities and a promissory note as security. It was held that the trustee in bankruptcy was not entitled to recover pos-

session of the pledged property but was entitled to redeem the pledge. *Miller v. Wahyou*, 235 F. 2d 612 (9th Cir. 1956), concerned the assignment of an interest of a former stockholder in a dissolved corporation. The assignment vested the assignee with sufficient interest to challenge a breach of trust on the part of the directors of the corporation.

The quotation from *Shipton v. Norrid*, 1 Colo. 404 (1872), is misleading in that it does not indicate that the sentence ends after the word "injury" where the quotation shows an omission. The rest of the quotation is in the following paragraph. The case held that fiduciaries holding legal title to a melodeon could bring replevin. The alleged quotation from *Illinois Sewing Machine Co. v. Harrison*, 43 Colo. 362, 3, 96 P. 177 (1908), which was a case concerning goods and chattels and not stock certificates, is a conglomeration of certain language found in the opinion in that case. The first sentence in the quotation paraphrases language found on page 364 of the Colorado Report, the second sentence appears on page 363 of the Colorado Report.

The cases cited on page 12 of the Petition for Writ of Certiorari deal with the following matters. *Hahauer v. Bartels*, 2 Colo. 514 (1875), concerned a sale of flour and whether or not title passed when delivered to a common carrier. *Benesch v. Waggoner*, 12 Colo. 534, 21 P. 706 (1889), involved bales of tobacco. *Webster v. Kautz*, 22 Colo. App. 111, 123 P. 139 (1912), was an action to quiet title to land. It indicated that the plaintiff in a quiet title action is not required to show an indefeasible title. *St. Aubin v. Marshall Field Co.*, 27 Colo. 414, 62 P. 199 (1900), was a replevin action to recover a stock of goods. A vender transferred two stocks of goods to a vendee, the vendee entering into possession. A tripartite agreement

was entered between the vendor, vendee and a creditor of the vendor by which both stocks were to be transferred to the vendor and by the vendor to the creditor. The bill of sale to the vendor contained both stocks but the one to the creditor contained only one. It was held that the creditor could maintain replevin for the other stock since he claimed them under the tripartite agreement. *Clay v. Martinez*, 74 Colo. 10, 218 P. 903 (1923), involved a bailment of sheep which had been improperly mortgaged by the bailee. *Harrison v. City and County of Denver*, 102 Colo. 98, 76 P. 2d 110 (1938), was a suit to remove a cloud on title to real property existing by reason of a tax deed thereto. The subjects of *Reeves v. Stokel, supra, Gross v. Dreiling, supra, In re Rogers, supra, U. S. v. Rosebush, supra*, and *McLeod v. Fourth National Bank of St. Louis, supra*, have previously been indicated. The *Somerville* case cited as 119 N.E. undoubtedly refers to the case of *Somerville National Bank v. Hornblower*, 393 Mass. 363, 199 N.E. 918 (1936). In that case a bank delivered certificates representing shares of stock to a broker by mistake and the broker transferred them to others. It was held that the broker was liable for conversion. *Williams v. Williams*, 274 P. 2d 359 (Okla. 1954), was an action by a father to replevin an automobile allegedly sold to him by his son but in the possession of the son's ex-wife. It was held that refusal to grant the ex-wife's motion to make more definite and certain the manner in which the plaintiff became the owner of the car was not abuse of discretion. *Baron v. Peoples National Bank of Secaucus*, 15 N.J. Super. 243, 84 A. 2d 492, (1951), was a replevin action by the pledgor of stock against the pledgee. It did not involve a transfer of the interest of the pledgor in the stock without a transfer of the certificate. *Journeymen Barbers v. Pollino*, 39 N.J. Super. 250, 120 A. 2d 767 (1956), was a labor union action to replevin "union shop cards" is-

sued to barbershop operators. Restatement-Trusts, §2. Comment (d), Title and Ownership, merely points out that for purposes of the restatement of the law of trust the term "owner" is used to indicate a person in whom one or more interests are vested for his own benefit. Under the restatement the term "title" does not indicate whether the holder holds property for his own benefit or as trustee.

The case of *Blackmer v. Blackmer*, 87 Colo. 483, 289 P. 366 (1930); did not involve an assignment of shares of stock without a delivery of the certificate. *Denver Onyx & Marble Manufacturing Co. v. Reynolds*, 72 F. 464 (10 Cir. 1895), was an action to recover possession of blocks of Arizona onyx. The quotation from *Baron v. Peoples National Bank of Secaucus, supra*, is taken from 46 Am. Jur. Replevin §22. This section is the last section under subpart b. "Particular Property" under part II. "Property Which Can Be Replevined." It points out that replevin may be maintained to recover the specific paper on which the certificate is printed. The section does not deal with the title or right to possession of the plaintiff in a replevin action which is contained in part III "Title or Right to Possession" beginning at §23 of 46 Am. Jur. Replevin.

11 *Fletcher, Cyclopedia of Corporation*, Par. 5097, merely points out that shares of stock are incorporeal and intangible property, existing only in abstract legal contemplation. The quotation therefrom on page 13 of the Petition does not appear in the 1958 Revised Edition.

III.

We are unable to find in any statute in the State of Colorado, either in the corporation laws thereof or the larceny provisions, any statements justifying the conten-

tions advanced by petitioner on page 13 of his brief as contained in the first paragraph of the third subdivision.

We think it to be axiomatic, from an examination of the statute, supra, that which ever petitioner claims; i.e., either the certificate itself or the shares represented thereby, that title thereto can only be vested in him in one of two methods: (1) By an endorsement and delivery of the certificate (this admittedly did not happen) or (2) By a delivery of the certificate and a separate document. Admittedly this did not happen. The existence of the separate document, Exhibit "E", (R. 22) must be conceded.

The inapplicability of *Stearns v. U. S.*, 291 U.S. 54, 61, 78 L. Ed. 647 (1934), page 14 of Petitioner's brief, is clearly apparent. There, the question of waivers deferring time for collecting taxes was involved. In addition the petitioner filed a request with the Commissioner to withhold the process of collection until credits were adjusted.

It is clearly apparent from an examination of the *Stearns* case that the attempted collection, which Stearns Company was complaining of in the proceedings involved, had been postponed at their request. An entirely different situation from the one at bar was presented. Here respondents had nothing to do with the execution of the assignment which petitioner relies upon. Its insufficiency, measured against the requirements of the statute, to either transfer title to the physical certificate claimed or to the shares of stock represented thereby in accordance with statutory law, is not the act of any of the respondents.

Mullane v. Central Hanover Bank and Trust Company, 70 S. Ct. 652, 339 U.S. 306 (1950), questioned the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law.

The opinion discussed the ineffectiveness, under certain circumstances, of notice by publication, and reversed the decision of the New York Court of Appeals for the reason that the facts disclosed did not meet the requirements of the Fourteenth Amendment.

In the *Woods v. Klobuchar*, 257 F. 2d 313 (7th Cir. 1958), the question was:

> "Was the plaintiff — appellant's action in the Federal Court under Section 1332, United States Code, title 28, governed by the six (6) months time limit, for filing claims in the court administering the decedent's estate.
>
> Our answer must be in the affirmative."

"Section 2-403 reads, in applicable part, as follows:

> 'All causes of action shall survive, and may be brought, notwithstanding the death of the person * * * liable to such action, * * * against the representative of the deceased party, * * * in event the action be brought subsequent to the death of the party against whom the cause existed, *then the same shall be prosecuted as other claims against said decedent's estate.*' "

The Court said, page 315, following the excerpt from such case quoted by appellant:

> "* * * Thus when paragraph 2-403, without which plaintiff's action would have died with David Klobuchar, was enacted it gave a new and theretofore unknown right and specifically provided the only method by and the time within which that right could be enforced. A Federal Court could not entertain this suit * * * when the identical action could not at that same time have been brought in an Indiana State Court be-

cause it was barred by the Statute of Limitations controlling therein."

Had this action been brought in a State Court of Colorado and noncompliance with the provisions of Section 31-9-1, supra, been called to the attention of the Court, the ruling, we believe, of the Colorado Court would have been the same as were the rulings and decisions of the lower Federal Courts where the matter was considered.

In considering the case of *U. S. v. Am. Nat. Bank of Jacksonville*, 255 F. 2d 504, 506 (1958), (this case is a Fifth Circuit case and not an Eighth Circuit) the language appearing therein and referred to on page 15 of the brief, it must be kept in mind that two matters were before the Court. The first was whether or not a federal tax lien attached to property held by entireties. The Court held that it did not and based its conclusion upon Florida decisions. The second matter for consideration was whether certain indebtedness of one of the tenants by entirety attached and was covered by a mortgage. The Court held that under the factual situation disclosed the "dragnet" provision in the mortgage did not apply and that the indebtedness sought to be included thereunder was not covered.

No factual similarity to the case at bar is disclosed.

The inapplicability of *Harris v. Egger*, 226 F. 389, 395 (6th Cir. 1915), page 15 of Petitioner's brief, is apparent from the opinion rather than the giving and drawing of interpretations as to the meaning of the language actually used.

On page 395 of the opinion the Court says this:

"It should be added that by statute of Tennessee it is provided: 'The stocks in all private corporations

are personal property, and subject to levy and sale as such, the company in such case being required to make the proper entries in its stock or transfer book • • •"

"This statutory rule will be recognized, and where necessary enforced, by the Federal Courts. (Citing cases) *It is well settled in Tennessee* that the title to stock passes and becomes complete in the purchaser upon the assignment of the certificate, without registration or transfer on the stock book of the corporation (citing cases)." (emphasis added)

We think it is obvious from the decision in *Harris v. Egger, supra*, that the Court was not passing upon a Tennessee Statute such as the one involved here. This decision was in 1915. Martindale shows that Tennessee adopted the Uniform Stock Transfer Act in 1925.

In passing we would like to say that we can find nothing in the decision of *Harris v. Egger, supra*, justifying the language appearing on page 15 of the brief after the word "citations".

Olan vs. Enterprise Publishing Company, 210 F. 2d 895 (5th Cir. 1954), cited by petitioner on page 16 of his petition discloses an utter lack of similarity to the case at bar. For the convenience of the Court we quote from page 896 of the opinion:

"Olan Mills, Inc., • • • a foreign corporation engaged in the photography business, was doing business in Louisiana and was planning to canvass the Bogalusa trade area. The local photographers, • • • three in number, objected to the entry of Olan Mills into this area. In the interest of harmony, a meeting was held in the office of the Mayor of Bogalusa on Thursday, June 5, 1952. At this meeting, the alleged defamatory

remarks were orally made by the two individual defendants. The next morning, the defendant Enterprise Publishing Company printed and published said defamatory utterances. In its complaint, the appellant set forth the facts constituting said libel and slander, its business reputation, and the deliberate intention of appellees to injure plaintiff. It failed to allege malice."

"Defendants White and Mornhinveg filed motion to dismiss the complaint for lack of jurisdiction, misjoinder of parties, and failure to state a claim upon which relief could be granted. The Enterprise Publishing Company raised the same objections, and, in addition, urged that its communications were privileged. After consideration of the matter upon briefs and oral argument, the court dismissed the complaint for failure to state a claim upon which relief could be granted."

The Circuit Court in a part of its opinion, which we believe might be said to be dicta, approved the District Court's not having sustained the motion to dismiss for lack of federal jurisdiction and misjoinder of parties. It further approved the action of the lower Court in dismissing the complaint as to the individual defendant Mornhinveg.

Syllabii five and six are devoted to a consideration of the proceedings as they apply to the appellee White. However, since petitioner seems to have excerpted the language appearing in syllabus eight relative to the Enterprise Publishing Company we quote:

"As to the Enterprise Publishing Company, its claim of privilege cannot be availed of by a motion to dismiss; it must be pleaded by answer, since pleas are

abolished under the Federal Rules of Civil Procedure. There may be an issue for the jury on this subject together with other issues. If the company had a qualified privilege, it may have gone beyond the scope of such defense. Such matters belong to a trial on the merits before the court and a jury, not to a motion to dismiss which admits so much (citing cases)."

Stanton v. Larsh, 239 F. 2d 104, 106 (5th Cir. 1956), page 16 of the petition was an action for damages for wrongful discharge. The District Court granted defendant's motion for judgment on the pleadings. The Court said at page 106:

"* * * In other words, a judgment on the pleadings alone, if sustained, must be based on the undisputed facts appearing in all the pleadings. * * *"

The motion dismissing the complaint below was predicated solely upon the fact that it appeared undisputed from the pleadings that petitioner, plaintiff below, had not complied with the mandatory and indispensable requirements of 31-9-1, supra.

Dotschay v. National Mutual Insurance Company of the District of Columbia, 246 F. 2d 221 (5th Cir. 1957) was an action for the alleged breach of duty of a liability insurer to compromise a claim.

Ryan v. Scoggin, 245 F. 2d 54, 57 (10th Cir. 1957) (erroneously cited as 246 F. 2d) was an action against a judge to recover damages for committing the daughter of the parties to a divorce action to a hospital. It is perfectly true that language of the general import attributed thereto by petitioner is to be found in the report of the case. However, in the same paragraph appears this language:

* * *

"But such a motion does not admit unwarranted inferences drawn from the facts or footless conclusions of law predicated upon them. • • •"

The facts in the present instance were and are that Petitioner admittedly received an assignment in the form attached to the Third Amended Complaint, Exhibit "E" (R. 22).

His "unwarranted inferences" and "footless conclusions of law" to the effect that compliance with the provisions of the statute was unnecessary do not and did not entitle him to a reversal in the Circuit Court or to consideration in this Court.

The dismissal was affirmed in the Ryan case.

Carass v. Outboard Marine Corporation, 252 F. 2d 430 (5th Cir. 1958), was a suit to recover for injuries sustained by a professional model when thrown from an outboard driven boat. The Circuit Court held that the complaint, which had been dismissed, was broad enough to let in various sorts of evidence which might have enabled the plaintiff to recover upon a trial. This, we believe, is far removed from the instant proceedings where it stands undisputedly admitted that the plaintiff had not complied with the provisions of Section 31-9-1, supra. If such proof was unavailable under any theory, no harm can have resulted in the dismissal of the action in limine instead of doing so after time which the congested docket of the District Court could ill afford.

An examination of the other federal cases, *Polk v. Glover*, 305 U.S. 5, 6 (15-16), 83 L. Ed. 6 (1938); *Dietrich v. Greaney*, 309 U.S. 190, 6, 84 L. Ed. 694 (1939); *Hardware Mutual Insurance Company v. Snyder*, 137 F. Supp. 812 (W.D. Penn. 1956), cited on page 16 of petitioner's application, discloses nothing in the facts considered there-

in in anywise militating against the judgment entered below. We will not prolong this by a detailed reference to them.

We are unable to determine from *Fardy v. Mayerstein*, 221 Ind. 339, 47 N.E. 2d 315, 317, (1943) the applicability of the particular quotation. The last sentence of such opinion, page 319, could be paraphrased, we believe, to read this way:

> "Appellant Brennan, choosing to reply upon the status of stockholder and having the burden of proving the allegations of his petition, undertook to show that he became such a purchaser at public sale, and failed in his proof."

In the instant proceeding Brennan, by his pleadings, conclusively established that the precedent conditions; endorsement on the certificate or assignment by separate instrument coupled with delivery of the certificate, as required by law, were not complied with and consequently ownership neither as to the certificate nor as to the shares of stock represented thereby vested in him.

We feel that Petitioner's remarks following the quotation from the *Fardy* case appearing on page 17 are unjustified, not borne out by the record and do not in anywise truthfully represent the factual situation presented here. To contend that certificate of stock number 46 was the subject matter of the action is but a play on words. An examination of the Third Amended Complaint clearly shows that what plaintiff had had purportedly assigned to him was the 50 shares of stock represented by the certificate. Nothing in the record discloses, to our knowledge, that the District Court had denied petitioner's motion under the discovery process; nothing in the record shows any attempted compliance with that part of Rule 21 which

provides that: "Parties may be dropped or added by order of the Court on Motion of any party or of its own initiative at any stage of the action and on such terms as are just." In other words by the Third Amended Complaint Petitioner named two additional corporations as defendants and in nowise made an effort to obtain an order of Court authorizing him so to do. Under such circumstances he is not in a position to complain of the fact that the Clerk of the District Court declined to issue summons.

Societe Internationale v. Rogers, 357 U. S. 197, 2 L. Ed. 2nd 255, 78 S. Ct. 1087 (1958), was an action in which a proceeding had been dismissed for failure to comply with a production order. This Court with clarity and detail set forth circumstances appearing below. In the present instance the failure to observe the requirements of statute, 31-9-1, supra, were clearly apparent. The legal effect of such failure was purely a question of law for the Court.

In the *Blackmer* case, 87 Colo. 483, 484, 289 Pac. 366 (1930), the Supreme Court of Colorado held a demurrer should have been sustained because the stock certificate sought to be returned was not alleged to be in the possession of the defendant. Nothing in the case in anywise militates against the contention of respondents in the present case that under the allegations of the complaint plaintiff had completely shown his lack of ownership of or right to possession of either the certificate in question or the stock represented thereby. In other words, petitioner pleaded himself out of Court.

Denver Onyx and Marble Mfg. v. Reynolds, 72 F. 464 (10th Cir. 1895), which was an action to recover blocks of Arizona onyx, again, we believe, but strengthens our contention that had petitioner contented himself with simply

having pleaded what various Colorado cases say is sufficient he unquestionably, until proof to the contrary was introduced, would have found himself situated differently than he now does.

CONCLUSION

We respectfully submit that the Writ should be denied for the reasons that the Petition for Certiorari (1) does not set forth any grounds in Rule 19 of part V of the Revised Rules of this Court, (2) does not comply with Rule 23 of part V of the Revised Rules of this Court, and (3) does not cite authority upon which a reversal could be predicated.

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May, 1959

APPENDIX

Colorado Revised Statutes (1953) § 31-9-1

Transfer of Title to Certificates and Shares. Title to certificates and to the shares represented thereby can be transferred only:

(1) By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(2) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or bylaws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferrable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

Source: L. 27, p. 265, § 1; CSA, C. 41, § 87.

Colorado Revised Statutes (1953) § 31-9-10

An Ineffectual Attempt to Transfer Amounts to Promise to Transfer. An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such

promise, shall be determined by the law governing the formation and performance of contracts.

Source: L. 27, p. 270, § 10; CSA, C. 41, § 96.

The following is the portion of Colorado Rule of Civil Procedure 104, "replevin", not set forth in the text of this brief.

"(c) *Bond: Writ.* The plaintiff shall file a written undertaking executed by two or more sufficient sureties or a corporate surety company, approved by the clerk, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action without delay, and with effect, and for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff. The clerk shall thereupon issue a writ requiring the sheriff to forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody until delivery as hereinafter provided. The sheriff shall also, without delay, serve on the defendant a copy of the writ, by delivering to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual abode of the defendant with some member of his family over the age of 18 years; or, if he has no place of abode, by putting said copy in the nearest postoffice, directed to the defendant. (Code Sec. 87.)

"(d) *Exception to Sureties. Liability of Clerk.* The defendant may, within 5 days after the service of a copy of a writ, give notice to the clerk that he excepts to the sufficiency of the sureties on plaintiff's undertaking. If he fails to do so within 5 days after such service, he shall

be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify, on notice, before the clerk within 5 days after such notice, and if they fail to justify in said time, the property shall be returned by the sheriff to the defendant. The clerk shall be responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify. If the defendant excepts to the sureties, he cannot reclaim the property as provided in this rule. (Code Sec. 88.)

"(e) *When Returned to Defendant. Bond.* At any time, within 48 hours from the time of the taking of the property and the service of the writ, the defendant may, if he does not except to the sureties of the plaintiff, require the return of the property, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, or a corporate surety company, who shall justify before such undertaking shall be accepted or approved, to the effect that they are bound to the plaintiff in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required in such time, it shall be delivered to the plaintiff, except as provided in this rule. (From Code Sec. 89.)

"(f) *Qualification of Sureties. New Bond.* The qualification of sureties and their justification shall be such as are prescribed for sureties on attachment bonds or undertakings. If, at any time, on notice, it shall appear to the court that any undertaking given is insufficient or that any surety therein has died or has removed from this state, or is or has been or is likely to become insolvent, said court shall order another and satisfactory undertaking to be

given within such time as the court shall direct. If any person to whom such order shall be directed shall fail to comply with the terms thereof the court shall order the return of the property to the adverse party pending the trial. (From Code Sec. 90.)

"(g) *Amended or Additional Bonds.* The court shall allow upon such terms, and within such time as may be just, the giving of amended or additional undertakings or affidavits in place of defective or insufficient ones. (Code Sec. 91.)

"(h) *Sheriff May Break Buildings, When.* If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his country. (Code Sec. 92.)

"(i) *Duty of Sheriff in Holding Goods.* When the sheriff shall have taken property, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same. (Code Sec. 93.)

"(j) *Claim by Third Person. Indemnity to Sheriff.* If the property taken be claimed by any other person than the defendant, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand, indemnify the sheriff against such claim by an undertaking of a corporate surety company, or with two sufficient sureties, each one qualifying as worth double the value of the property as specified in the affidavit of the

plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution; and no claim to such property by any other person than the defendant shall be valid against the sheriff unless so made. (From Code Sec. 94.)

"(k) *Custodian of Property. Bond.* If the property taken be of extraordinary kind, or of uncertain value, any claimant thereof may apply to the court upon due notice and thereupon the court, after a hearing upon affidavits or otherwise, may direct in whose custody the property shall be kept pending the litigation, and may require the custodian to give bond with sufficient surety for the forthcoming of the property to abide the further order of the court. (From Code Sec. 95.)

"(l) *When Sheriff Files Papers.* The sheriff shall file the notice and all undertakings and affidavits with his proceedings thereon, with the clerk within 20 days after taking the property mentioned thereon. (From Code Sec. 96.)

"(m) *Judgment.* In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. The provisions of Rule 13 shall apply to replevin actions. (Supplants Code Sec. 247.)"